

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MARISELA M. LOPEZ and ABNER A.
 LOPEZ,

Plaintiffs,

v.

WELLS FARGO BANK, NA, et al.,

Defendants.

3:11-cv-740-RCJ-WGC

ORDER

Currently before the Court are three Motions to Dismiss (#6, 8, 16), a Motion to Remand (#12), and an Ex Parte Motion for Temporary Restraining Order (#29). For the following reasons, the Court grants the motion to remand (#12), grants the motion for temporary restraining order (#29), and dismisses the motions to dismiss for lack of jurisdiction (#6, 8, 16).

BACKGROUND

I. Facts

Plaintiffs Marisela M. Lopez and Abner A. Lopez (collectively "Plaintiffs") executed a note secured by a deed of trust on a piece of property located at 480 Golden Vista Avenue, Reno, Nevada 89506, which was recorded in Washoe County on July 17, 2006. (Deed of Trust (#9-1) at 5, 7). The mortgage, dated July 12, 2006, was for \$400,500. (*Id.* at 6). The lender on the deed of trust was Wells Fargo Bank, NA. (*Id.* at 5). The trustee on the deed of trust was United Title of Nevada. (*Id.* at 6).

On December 15, 2010, Stanley Silva, an agent of LSI Title Agency and Ticor Title of Nevada, executed and filed a notice of default and election to sell purportedly on behalf of National Default Servicing Corporation, an agent for Wells Fargo. (Notice of Default (#9-2) at

1 2-3). The notice of default stated that Plaintiffs were behind in their payments and owed
2 \$29,424.41 as of that date. (*Id.* at 2).

3 On February 23, 2011, Wells Fargo Bank by its attorney in fact National Default
4 Servicing Corporation executed a corporation assignment of deed of trust and transferred all
5 beneficial interest in the deed of trust to US Bank National Association. (Assignment of Deed
6 of Trust (#9-2) at 6).

7 On that same day, February 23rd, National Default Servicing Corporation executed a
8 substitution of trustee and replaced itself as the trustee for United Title of Nevada.
9 (Substitution of Trustee (#9-2) at 8).

10 On March 22, 2011, National Default Servicing Corporation recorded a certificate from
11 the Nevada Foreclosure Mediation Program stating that the beneficiary could proceed with the
12 foreclosure process because the property was “non-applicable.” (Mediation Certificate (#9-2)
13 at 10).

14 **II. Complaint**

15 On October 13, 2011, Wells Fargo filed a petition for removal and attached Plaintiffs’
16 amended complaint from the Second Judicial District Court in Washoe County. (Pet. for
17 Removal (#1); Compl. (#1-2) at 17-31). In the amended complaint, Plaintiffs sued Wells Fargo
18 Bank NA, United Title of Nevada, US Bank National Association, National Default Servicing
19 Corporation, Tigor Title Agency of Nevada, Inc., and LSI Title Agency, Inc. (Compl. (#1-2) at
20 17).

21 The complaint alleged the following. The notice of default had not been executed by
22 the trustee, United Title, or by the lender, Wells Fargo. (*Id.* at 20). Instead, the notice of
23 default was executed by Stanley Silva of Tigor Title of Nevada as agent for LSI Title Agency
24 for National Default Servicing Corporation. (*Id.* at 20-21). Plaintiffs alleged that the notice of
25 default was void and that no further actions could be taken by any party against their property
26 based on that notice of default. (*Id.* at 21). Plaintiffs also alleged that the property at issue
27 was their principal residence and that they were qualified to participate in the Nevada
28 mediation program, but were not provided information in a timely manner. (*Id.* at 22).

1 Plaintiffs alleged three causes of action. (*Id.* at 25). In the first cause of action,
 2 Plaintiffs alleged unlawful or fraudulent foreclosure because the foreclosure documents did
 3 not provide sufficient evidence that those entities had the right to enforce the deed of trust.
 4 (*Id.* at 26). In the second cause of action, Plaintiffs sought declaratory relief. (*Id.* at 27). In
 5 the third cause of action, Plaintiffs sought injunctive relief to stop the foreclosure sale. (*Id.* at
 6 28). Pursuant to the *ex parte* motion for a temporary restraining order, it appears that the
 7 trustee's sale is scheduled for January 4, 2012.¹ (Mot. for TRO (#29) at 2).

8 LEGAL STANDARD

9 Pursuant to Federal Rule of Civil Procedure 65(b), a court may issue a temporary
 10 restraining order without written or oral notice to the adverse party or its attorney only if:
 11 "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable
 12 injury, loss, or damage will result to the movant before the adverse party can be heard in
 13 opposition" and "the movant's attorney certifies in writing any efforts made to give notice and
 14 the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1)(A)-(B). The restraining
 15 order must "state the date and hour it was issued; describe the injury and state why it is
 16 irreparable; state why the order was issued without notice; and be promptly filed in the clerk's
 17 office and entered in the record." Fed. R. Civ. P. 65(b)(2).

18 DISCUSSION

19 I. Motion to Remand (#12)

20 Plaintiffs filed a motion to remand this case back to state court. (Mot. to Remand (#12)
 21 at 1). Plaintiffs argue that there is no federal question jurisdiction because their claim is based
 22 in state law. (*Id.* at 3). Plaintiffs argue that there is no diversity jurisdiction because United
 23 Title of Nevada and Ticor Title of Nevada are both Nevada corporations. (*Id.* at 5).

24 In response, LSI Title argues that this Court does have diversity jurisdiction in this case
 25 because United Title of Nevada, Inc. and Ticor Title Agency of Nevada, Inc. were fraudulently
 26

27 ¹ The motion for TRO states that the trustee's sale is scheduled for January 4, 2011.
 28 (Mot for TRO (#29) at 2). However, Plaintiffs most likely meant January 4, 2012, given that
 they filed the motion for TRO on December 29, 2011. (*Id.* at 1).

1 joined. (Opp'n to Mot. to Remand (#19) at 3). LSI Title argues that United Title was the
2 original trustee on Plaintiff's deed of trust and Ticor signed the notice of default as agent for
3 LSI, but asserts that neither of those entities are attempting to foreclose on the property and,
4 thus, no cause of action can be reasonably asserted against them. (*Id.* at 4).

5 In reply, Plaintiffs assert that United Title of Nevada and Ticor Title of Nevada still have
6 responsibilities under the note because there was never a valid assignment or valid
7 substitution of trustee. (Reply to Mot. to Remand (#24) at 2).

8 Pursuant to 28 U.S.C. § 1332, the district courts have original jurisdiction of all civil
9 actions where the amount in controversy exceeds \$75,000 and is between citizens of different
10 states. 28 U.S.C. § 1332(a)(1).

11 In this case, Plaintiffs are correct that this Court lacks subject matter jurisdiction. First,
12 this Court lacks federal question jurisdiction because Plaintiffs' substantive claim is based on
13 a statutory defect in Nevada foreclosure law. Second, this Court lacks diversity jurisdiction
14 because Plaintiffs are citizens of Nevada and two of the defendants are Nevada corporations.
15 Despite what Defendants argue, United Title of Nevada and Ticor Title Agency of Nevada are
16 not fraudulently joined. United Title of Nevada is the original trustee on the deed of trust.
17 Additionally, there has been no valid substitution of trustee because the substituted entity,
18 National Default Servicing Corporation, substituted itself as the trustee. (See Substitution of
19 Trustee (#9-2) at 6). Additionally, Ticor Title Agency of Nevada is not fraudulently joined
20 because it is one of the entities that executed the notice of default and, thus, is a proper party
21 to this defective foreclosure action. (See Notice of Default (#9-2) at 3).

22 Accordingly, this Court grants the motion to remand (#12) because it lacks subject
23 matter jurisdiction over this case. Because this Court lacks subject matter jurisdiction the
24 Court dismisses the motions to dismiss (#6, 8, 16) for lack of jurisdiction. However, because
25 Defendants are set to sell the property at a trustee's sale on January 4, 2012, the Court grants
26 the motion for a temporary restraining order before remanding the case.

27 **B. Motion for Temporary Restraining Order (#29)**

28 Plaintiffs seek a motion for a temporary restraining order to stop the trustee's sale

1 scheduled for January 4, 2012. (Mot. for TRO (#29) at 2). Plaintiffs assert that Defendants
2 failed to comply with NRS § 107.080 *et seq.* (*Id.*). Plaintiffs argue that they will suffer
3 irreparable harm or injury because they will lose their home and their family will be displaced.
4 (*Id.* at 1-2).

5 In this case, the Court grants the motion for a temporary restraining order. The facts
6 of this case demonstrate a wholly defective foreclosure. First, Stanley Silva, as an agent for
7 LSI Title Agency and Ticor Title of Nevada executed the notice of default on behalf of National
8 Default Servicing Corporation, a purported agent of Wells Fargo. (See Notice of Default (#9-2)
9 at 2-3). There are no documents in the record that demonstrate that any of those “agents” had
10 the authority to act on behalf of Wells Fargo. Additionally, on the date that Stanley Silva had
11 executed the notice of default, none of those purported agents had been substituted as
12 trustees. Second, the substitution of trustee is defective. (See Substitution of Trustee (#9-2)
13 at 8). National Default Servicing Corporation executed its own substitution of trustee with no
14 authority from anyone associated with the original deed of trust. As such, Plaintiffs have
15 demonstrated a likelihood of success on the merits of their claim. Additionally, Plaintiffs will
16 suffer irreparable injury if Defendants are able to sell Plaintiffs’ home without the authority to
17 do so. Accordingly, the Court grants the motion for a temporary restraining order (#29).

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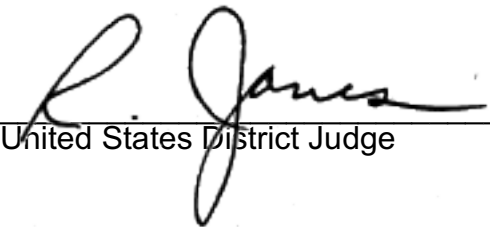
CONCLUSION

For the foregoing reasons, IT IS ORDERED that the Motion to Remand (#12) is GRANTED for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that the Ex Parte Motion for Temporary Restraining Order (#29) is GRANTED. This TRO expires on January 13, 2012, at 5:00 pm. All further motions must be filed in state court pursuant to the remand.

IT IS FURTHER ORDERED that the Motions to Dismiss (#6, 8, 16) are DISMISSED for lack of jurisdiction.

DATED: This 30th day of December, 2011.


United States District Judge